

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY M. ALEXANDER)	
Claimant)	
VS.)	
)	Docket Nos. 223,176; 223,242;
)	223,243; & 223,244
FARMLAND INDUSTRIES, INC.)	
Respondent)	
AND)	
)	
WAUSAU INSURANCE COMPANIES)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed the February 12, 1999 Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on July 14, 1999.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Garry W. Lassman of Pittsburg, Kansas, appeared for the respondent and its insurance carrier. Edwin H. Bideau III of Chanute, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. At oral argument to the Appeals Board, the respondent and its insurance carrier announced that they were dismissing their claim against the Workers Compensation Fund. The Workers Compensation Fund announced that it agreed to the dismissal and that it was dismissing its request for costs and attorney fees. The parties also announced that the appropriate insurance carrier in this proceeding was Wausau Insurance Companies.

ISSUES

Docket #223,176 is a claim for injuries to the back, right shoulder, and right arm that allegedly occurred on September 28, 1994.

Docket #223,242 is a claim for injuries to the left knee that allegedly occurred on January 19, 1995.

Docket #223,243 is a claim for injuries to the low back, right shoulder, and left knee that allegedly occurred each and every working day through January 28, 1997.

Docket #223,244 is a claim for injuries to the low back that allegedly occurred on January 23, 1997.

Citing Berry¹ as authority, Judge Frobish found that the appropriate date of accident for all four claims should be January 27, 1997, when claimant quit working because of his injuries. Averaging a 66 percent task loss with a 100 percent difference in pre- and post-injury wages, the Judge determined that claimant had an 83 percent work disability. The Judge then deducted 15 percent for preexisting impairment and then determined that claimant should receive benefits for a 68 percent permanent partial general disability. Because claimant was receiving payments from a pension plan that the respondent had contributed to, the Judge found that claimant's disability benefits should be reduced by a portion of the pension payment or \$282.91 per week; provided, however, that claimant's benefits would not be reduced to less than his nine percent (24 percent less 15 percent for preexisting impairment) functional impairment rating.

Claimant contends Judge Frobish erred by (1) reducing the award by 15 percent for a preexisting impairment and by reducing the weekly permanent partial disability benefit by a portion of the pension payment, (2) accepting Dr. James W. Zeiders' opinion of preexisting impairment while rejecting the doctor's other opinions of functional impairment, and (3) by reducing the weekly permanent partial general disability benefits because of disability pension payments.

Conversely, respondent and its insurance carrier contend that (1) claimant failed to prove that he injured himself working for respondent each and every day through his last day at work on January 27, 1997, (2) because claimant failed to make a good faith effort to find appropriate employment but instead voluntarily left the open labor market and elected to seek Social Security disability and early retirement benefits, the Judge erred by finding that claimant had a 100 percent wage loss and should have imputed, at a minimum, \$240 per week as the post-injury wage, (3) the Judge erred by finding claimant's task loss was 66 percent as it should actually be between 36.4 and 50 percent, and (4) the

¹ Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

permanent partial general disability should be limited to claimant's functional impairment rating.

The issues before the Board on this appeal are:

1. Did the claimant sustain injury while working for the respondent through his last day of work on approximately January 27, 1997?
2. If so, what is the nature and extent of his injury and disability?
3. What amount, if any, should be deducted for preexisting impairment?
4. Is it proper to reduce claimant's permanent partial disability benefits by any of the pension payment that he is receiving?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Gary M. Alexander worked for Farmland Industries for approximately 30 years before retiring on January 28, 1997. For the last 19 years with Farmland, Mr. Alexander worked as a pipe fitter in the company's refinery performing heavy manual labor.
2. In 1982, Mr. Alexander sustained his first significant work-related injury when a co-worker fell from the top of a 20-foot ladder, striking Mr. Alexander on the head and shoulder. The company referred Mr. Alexander to Dr. James W. Zeiders, an orthopedic surgeon in Bartlesville, Oklahoma, for medical treatment. The doctor treated Mr. Alexander for compression fractures in the dorsal spine.
3. In both 1992 and 1994, Mr. Alexander injured his back at work. A second work-related incident in 1994 again injured Mr. Alexander's back, along with the right arm and shoulder. In 1995, Mr. Alexander injured his left knee while working at the refinery. For all those accidents and injuries, Mr. Alexander treated with Dr. Zeiders. Since 1982, Mr. Alexander has seen Dr. Zeiders for work-related injuries every year through 1998.
4. In September 1995, Farmland sent Mr. Alexander to Dr. Zeiders to determine if he qualified for the company's disability pension. As the doctor did not think that Mr. Alexander was totally disabled at that time, Mr. Alexander returned to work for Farmland. Despite progressively worsening symptoms in his low back, right shoulder, and left knee, Mr. Alexander continued to work for Farmland until late January 1997 when Dr. Zeiders determined that Mr. Alexander had become totally disabled and should not be working. At that time, Mr. Alexander was 57 years old.

5. Mr. Alexander is now receiving Social Security disability benefits. Additionally, because he qualifies for Social Security disability benefits, Mr. Alexander also qualifies for and receives a pension payment from Farmland. He has not worked anywhere or sought any employment since Dr. Zeiders told him he was totally disabled and should not be working. At this time, Mr. Alexander does not believe he is able to work as he has difficulty sitting and standing for any length of time, walking more than two or three blocks, and has pain with pushing, pulling, and lifting.

6. Following the 1982 accident and injury to the dorsal spine, Dr. Zeiders gave Mr. Alexander a 15 percent whole body functional impairment rating.

7. Using the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment (Guides), Dr. Zeiders rated Mr. Alexander as having a 60 percent whole body functional impairment considering all the injuries he sustained at Farmland. The doctor apportioned that percentage as 40 percent representing the impairment sustained at work and 20 percent for the impairment that was not work-related. Reviewing the task list prepared by vocational rehabilitation counselor Karen Crist Terrill, the doctor testified that Mr. Alexander could no longer do four of six, or 66⅔ percent, of his former job tasks. Believing that Mr. Alexander was trained only for manual labor and believing that no other employer would hire Mr. Alexander because of his age and his history of problems, the doctor testified that Mr. Alexander was not able to perform any substantial, gainful employment.

8. At his attorney's request, in April 1997 Mr. Alexander was examined and evaluated by orthopedic surgeon Dr. Edward J. Prostic. He testified that Mr. Alexander had early degenerative arthritis in the left knee, rotator cuff tendinitis and/or a rotator cuff tear in the right shoulder, degenerative disc disease in the spine, and perhaps a herniated thoracic disc. Using the fourth edition of the AMA Guides, Dr. Prostic rated Mr. Alexander as having a 28 percent whole body functional impairment for injuries to the right shoulder, spine, and left knee, with preexisting impairment contributing from one-third to one-half of that rating. Reviewing Karen Crist Terrill's task list, the doctor testified that Mr. Alexander can no longer do three of six, or 50 percent, of his former job tasks as a result of the injuries that he sustained at Farmland. In his April 3, 1997 report, Dr. Prostic wrote that Mr. Alexander should have an MRI of his thoracic spine to determine if there is a disk herniation that is causing his severe pain and an MRI of the right shoulder to rule out a tear in the rotator cuff. Regarding the ability to work, the doctor wrote:

. . . Presently, the patient is unable to return to work that requires substantial standing, sitting, walking, or riding; more than minimal bending or twisting at the waist; lifting or carrying weights greater than 25 pounds occasionally or 10 pounds frequently. He should also limit squatting, kneeling, climbing, and walking over uneven surfaces.

9. At the insurance carrier's request, Mr. Alexander was evaluated by Dr. Philip R. Mills, who is board certified in physical medicine and rehabilitation. The doctor examined Mr. Alexander in April 1997 and diagnosed spinal stenosis, bicipital and supraspinatus tendinitis, two compression fractures in the thoracic spine, internal derangement in the left knee, and substantial degenerative changes in the low back. Using the fourth edition of the AMA Guides, Dr. Mills rated Mr. Alexander as having a 27 percent whole body functional impairment for the injuries to the thoracic spine, lumbosacral spine, right upper extremity, and left knee. The doctor was unable to provide an opinion regarding the extent of Mr. Alexander's preexisting impairment. Reviewing a task list prepared by vocational rehabilitation counselor Dick Santner, Dr. Mills testified that Mr. Alexander could no longer do at least eight, and perhaps as many as 10, of his 11 former job tasks. The doctor believes Mr. Alexander should be restricted to sedentary activities and that he would have problems walking for a prolonged period, bending forward, climbing ladders, squatting, and doing any work that required him to reach above his shoulders. Dr. Mills was not asked if Mr. Alexander was totally disabled from working.

10. Judge Frobish requested Dr. Dale E. Darnell, a board certified orthopedic surgeon, to evaluate Mr. Alexander. Dr. Darnell examined Mr. Alexander in November 1997 and found that he had an 18 percent whole body functional impairment rating for injuries to the lumbar spine, right shoulder, and left knee. Because Dr. Darnell did not believe his impairment rating for the thoracic spine would be greater than the 15 percent that Mr. Alexander had already received, the doctor did not rate that part of the spine. The doctor began to provide an opinion of task loss but was stopped and not asked to finish. There are tasks listed in the exhibits attached to the doctor's deposition. But there is no evidence that the notations on the exhibits represent the doctor's opinion of task loss. In the event Mr. Alexander returned to work, Dr. Darnell would restrict him from working with his right arm in an overhead position and prohibit him from kneeling, squatting, crawling, climbing ladders, and heavy repetitive lifting. Also, the doctor believes that Mr. Alexander should be allowed to change positions as his pain dictated. Dr. Darnell was not asked if Mr. Alexander was totally disabled from working.

11. Mr. Alexander hired rehabilitation consultant Karen Crist Terrill to review his work history and determine what job tasks he performed over the 15 years immediately before his accidental injuries. She testified that there were some jobs in the open labor market that Mr. Alexander could perform despite his injuries, some of which might require special accommodation.

12. Farmland and its insurance carrier hired vocational rehabilitation counselor Dick Santner to evaluate and list Mr. Alexander's past work tasks. When asked if Mr. Alexander retained the ability to work, Mr. Santner stated:

. . . I felt that he would probably be able to perform some type of work in a retail store setting; ideally, I feel he could work at some type of a store clerk job and earn somewhere between minimum wage, which is currently \$5.15 per hour, up to a maximum of about six dollars per hour.

CONCLUSIONS OF LAW

1. Judge Frobish found that the appropriate date of accident for all of these claims should be January 27, 1997. The Appeals Board agrees. The greater weight of the evidence indicates that Mr. Alexander sustained injury each and every day that he worked for Farmland. Dr. Zeiders testified that the injuries to Mr. Alexander's left knee, right shoulder, and low back were aggravated and accelerated by his work at Farmland and continued through his last day of work in January 1997. Considering the strenuous nature of Mr. Alexander's job, the Board finds that Dr. Zeiders' opinion regarding causation to be very persuasive. That opinion is also echoed by both doctors Prostic and Mills.
2. Persuaded by the testimony of Dr. Darnell, the physician selected by the Judge to provide an independent medical evaluation, the Appeals Board finds and concludes that Mr. Alexander sustained an 18 percent whole body functional impairment for the injuries that he sustained to his low back, right shoulder, and left knee through his last day at work in January 1997. That rating excludes the preexisting impairment to the thoracic spine.
3. Because his is an "unscheduled" injury, Mr. Alexander's entitlement to permanent partial general disability benefits is governed by K.S.A. 1996 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk² and Copeland.³ In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wage loss when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

4. The only doctor to testify that Mr. Alexander was totally disabled was Dr. Zeiders. But the doctor formulated that opinion by giving considerable weight to Mr. Alexander's age and work history as a manual laborer. In this instance, the Board finds the opinions of vocational rehabilitation counselors Karen Crist Terrill and Dick Santner persuasive and concludes that Mr. Alexander retains the ability to work in the open labor market. Born in August 1939, at the time of regular hearing Mr. Alexander was only 59 years old. The Board concludes that sedentary jobs exist in the open labor market that he can perform.

5. Mr. Alexander has not been seeking employment since he left Farmland's employment in January 1997. Therefore, the Board concludes that he has not made a good faith effort to find appropriate employment and that the federal minimum wage of \$206 per week should be imputed for purposes of the wage loss prong of the permanent partial general disability formula. Comparing \$206 to the \$785.10 that Mr. Alexander was earning before these injuries yields a wage loss of 74 percent.

6. Averaging the approximate 67 percent task loss provided by Dr. Zeiders with the approximate 73 percent task loss provided by Dr. Mills with the 50 percent loss provided by Dr. Prostic, the Board concludes that Mr. Alexander lost the ability to perform 63 percent of his former job tasks.

7. The permanent partial general disability formula requires the percentage difference between pre- and post-injury wages (74 percent) to be averaged with the percentage of task loss (63 percent), which yields a 69 percent work disability.

8. The Workers Compensation Act requires awards of compensation to be reduced by the amount of preexisting functional impairment.⁴ The Act provides:

² Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

³ Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ K.S.A. 1996 Supp. 44-501(c).

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Based on Dr. Zeiders' uncontroverted testimony, the Board concludes that Mr. Alexander had a 15 percent functional impairment as a result of the 1982 back injury. The Board concludes that the thoracic injury and impairment was considered and included by the doctors when they formulated their opinions of task loss. Therefore, for purposes of the award Mr. Alexander's 69 percent permanent partial general disability should be reduced by 15 percent.

9. The Workers Compensation Act states that Social Security retirement benefits and other retirement benefits provided by an employer shall reduce the weekly benefit payable under the Act.⁵ But the pension payment that Mr. Alexander receives from Farmland is not a retirement benefit; instead, it is a disability pension. Therefore, it should not reduce the benefits awarded in this proceeding.⁶

10. Based upon the above, Mr. Alexander is entitled to receive an award for a 54 percent permanent partial general disability.

11. The Appeals Board adopts the Judge's findings and conclusions as set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board modifies the February 12, 1999 Award as follows:

Gary M. Alexander is granted compensation from Farmland Industries, Inc., and its insurance carrier for a January 27, 1997 accident and resulting disability. Based upon an average weekly wage of \$785.10, Mr. Alexander is entitled to receive 224.10 weeks of permanent partial disability benefits at \$338 per week, or \$75,745.80, for a 54 percent permanent partial general disability.

⁵ See K.S.A. 44-501(h).

⁶ See Green v. City of Wichita, ____ Kan. App. 2d ____, 977 P.2d 283, *rev. denied* ____ Kan. ____ (1999).

As of August 3, 1999, there would be due and owing to the claimant 131.14 weeks of permanent partial compensation at \$338 per week in the sum of \$44,325.32, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$31,420.48 shall be paid at \$338 per week until further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Garry W. Lassman, Pittsburg, KS
Edwin H. Bideau III, Chanute, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director